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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

315 U.S. 800

No. 810.

FRANK J. BOEHM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....

FRANK J. BOEHM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court:

Petitioner Frank J. Boehm respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner in an indictment of five counts was charged with perjury in violation of Section 125 of the Criminal Code, 35 Stat. 1111, 18 U. S. C. A., Section 231 (R. 8). He was tried in the United States District Court at St. Louis, Missouri, the jury acquitting him on three counts of the indictment and convicting him on two (R. 1114). The

maximum sentence of five years in a penitentiary and a two-thousand-dollar fine on each count was imposed. The penitentiary sentences were ordered to run concurrently (R. 1118, 1119). The judgment of conviction was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit in an opinion filed November 6, 1941 (R. 1239). Petition for rehearing was denied November 26, 1941 (R. 1313).

The offenses charged were alleged to have been committed when petitioner testified before representatives of the Securities and Exchange Commission during an investigation of the affairs and practices of the Union Electric Company of Missouri by the Commission. Petitioner at the time in question was executive vice-president of the Union Electric Company of Missouri (R. 135).

The indictment charged (R. 9, 16-18) that the investigation in question was conducted under the Securities Act of 1933, Securities Exchange Act of 1934 and Public Utility Holding Company Act of 1935; that Union Electric Company of Missouri had securities registered under the Securities Act of 1933; had registered securities upon the National Securities Exchange under the Securities Act of 1934; was a holding company within the meaning of the Public Utility Holding Company Act of 1935, and a subsidiary of the North American Company, a registered holding company within the meaning of that Act. It was further charged that the investigation was to determine the facts with respect to the alleged maintenance of a slush fund by officers of the Union Electric Company; padding of expense accounts submitted to and paid by said company; the alleged securing of money by means of rebates and kick backs from persons, firms and corporations with which the Union Electric Company and its subsidiary companies dealt; the making of political contributions, and the accuracy of registration or financial state-

ments filed by the Union Electric Company of Missouri and the North American Company with the Commission.

In the first count of the indictment petitioner was charged with having falsely testified at a hearing Decem-19, 1938, that he had never approved any expense account which was padded or upon which the padding was done with his authority (R. 11).

In the second count it was charged that he falsely testified at a hearing on January 16, 1939, (a) that his expense accounts represented actual expenditures made by him and reflected substantially the purposes for which made; (b) that he had never put his initials or o. k. on any expense account which he knew to be padded; (c) that there had never been a practice of gaining money through the mechanics of kick backs or rebates from attorneys or supply houses (R. 13).

The third count charged that he falsely testified at a hearing February 18, 1939, that he knew of no slush fund maintained by the Union Electric Company of Missouri (R. 15).

The fourth count charged that he falsely testified July 10, 1939, (a) that he did not pad his expense accounts and that those he submitted corresponded exactly with what his expenses were as nearly as he could make them; (b) that he took all of the trips that were listed on his expense vouchers during a certain period of time; (c) that a fund had never been maintained by the Union Electric Company of Missouri for political purposes, and that any money in his office, on his person, or in his safe was his personal fund; (d) that no money was obtained by means of kick backs or rebates from attorneys (R. 19).

The fifth count charged that he falsely testified at a hearing on July 11, 1939, (a) that there was no practice of obtaining money by kick backs or rebates through pur-

chases made, and that no money was derived off the record or in any other manner for a slush fund; (b) that he had never made any political contributions for any candidate for public office on behalf of the Union Electric Company of Missouri; and (c) that he had never made a political contribution in an amount in excess of one hundred dollars (R. 21).

The Government, in presenting its case at the trial, introduced in evidence those portions of a transcript of petitioner's testimony given on the occasions mentioned in the indictment, which were alleged to be false (R. 343 to 365).

Thereafter the Government introduced voluminous evidence consisting of testimony of witnesses and exhibits, which was offered for the purpose of proving that there existed an alleged practice of obtaining rebates from supply houses and from insurance brokers; to establish an alleged practice of obtaining funds through kick backs from attorneys of a portion of fees charged; seeking to establish a practice of padding expense accounts, and that appellant padded his expense accounts, and that from a fund raised by such methods political contributions were made.

A number of the principal witnesses for the Government admitted at the trial that they had previously given testimony before representatives of the Securities and Exchange Commission during the course of the investigation which was contrary to the testimony which they gave at the trial; that they were thereafter granted immunity and changed their testimony. They testified that the prior conflicting testimony had been false, and that which they gave at the trial was true. One denied this though admitting having been granted immunity. (Record references to these witnesses is given hereafter in this statement.) Petitioner repeatedly sought to obtain a transcript of this prior contradictory testimony for the purpose of cross-

examining these witnesses for the purpose of impeachment, as it would be relevant and material for that purpose and would go directly to the weight and credibility of their testimony. Every request therefor was denied, as the following citations from the record will demonstrate:

Prior to the trial petitioner presented an application for an order to produce a transcript of this prior testimony of some of these witnesses (R. 256), which was overruled (R. 258). At the commencement of the trial petitioner presented an application for a subpoena duces tecum directed to the representatives of the Securities and Exchange Commission for a transcript of this prior testimony (R. 258), which was denied (R. 261). Thereafter, and during the course of the trial, further application for a subpoena duces tecum directed to the officers and representatives of the Securities and Exchange Commission and to the United States District Attorney for a transcript of this testimony was presented (R. 262), which was denied (R. 264). During the cross-examination of some of these witnesses, when it developed they had given prior contradictory testimony, a request was made by counsel for petitioner for a transcript of this testimony, which in every instance was denied. These instances may be found during the cross-examination of the following Government witnesses: B. P. Alschuler (R. 387-389); Rex Fowler (R. 398); Harry Williamson (R. 466, 908); Frederick J. Martin (R. 968), and during the direct examination of Harry C. Coles of the Securities and Exchange Commission, who was recalled by petitioner (R. 1078, 1079).

Of these witnesses Herman Spoehrer, whose testimony (R. 621, 674, 692) was to the effect that he had collected moneys as service charges, discounts or return premiums from insurance companies and either disbursed it on instructions from petitioner or delivered it to him, and had

also padded his expense accounts, testified (R. 634, 635) that he had been granted immunity, and denied (R. 638) that he had ever given prior contradictory testimony, although he had testified before the representatives of the Securities and Exchange Commission.

Another of these witnesses, Eugene R. Kropp, whose testimony pertained to returns of money from insurance companies as a result of surveys, service charges, fleet or experience discounts (R. 638-642), and that he had padded his expense accounts and turned the excess over to Spoehrer (R. 742-744), testified (R. 758) that he had given prior contradictory testimony before the Commission representatives, then had been given immunity and changed his testimony.

George K. Miltenberger, who testified (R. 567, 568) with reference to alleged return of money from a supply company, which he stated he delivered to petitioner, and (R. 803-806) that he padded his expense accounts and turned the excess over to petitioner, admitted that he had given prior contradictory testimony before the representatives of the Commission, had been granted immunity and then changed his testimony (R. 568, 569, 808).

B. P. Alschuler, a lawyer, who testified (R. 376-380) that he had returned part of fees collected to officers of the company, admitted that he had given testimony before representatives of the Commission different from that given at the trial (R. 382, 386, 390, 391). That he had been threatened with criminal prosecution and disbarment proceedings (R. 385), was then granted immunity (R. 391) and changed his testimony.

Another of these witnesses, Rex Fowler, a lawyer, testified that he had returned to company officials part of fees collected (R. 396, 397), and admitted (R. 398) that he had

given prior contradictory testimony, then was granted immunity and changed his testimony (R. 399).

E. B. Hamilton, a lawyer, testified (R. 474-480) that he had returned to officials of the company a portion of moneys received as fees. He admitted having given prior contradictory testimony before representatives of the Commission, but denied that any promises of immunity had been made before he changed his testimony (R. 491).

Another of these witnesses, L. H. Keller, testified (R. 533-550) with reference to alleged rebates made on orders for supplies, and admitted giving prior conflicting testimony before the Commission, was then granted immunity and changed his testimony (R. 554).

Harry Williamson testified (R. 458-462) that he received sums of money from Fowler and Alschuler which he delivered to officials of the company. He admitted (R. 464-467) that he gave prior contradictory testimony before representatives of the Commission. That an intimation of prosecution for perjury was then made (R. 468, 469, 470); that he was then granted immunity and changed his testimony (R. 473).

Albert C. Laun, principal witness for the Government on all phases of the case (R. 970-996), testified (R. 997) that by reason of prior testimony he had been indicted for perjury and had pleaded guilty and been sentenced to the penitentiary and returned therefrom for the purpose of testifying at the trial. He denied (R. 998) that he had any agreement with representatives of the Securities and Exchange Commission that on making a plea no punishment would be inflicted, but admitted (R. 1000) that he had a hearing for parole pending which was to be heard a short time later.

Another of these witnesses, Frederick J. Martin, testified (R. 965) concerning alleged political campaign con-

tributions, and admitted that he had given prior conflicting testimony before representatives of the Securities and Exchange Commission; that thereafter he was indicted, pleaded guilty, made an application for probation, and while same was pending again testified before representatives of the Commission and changed his testimony, and thereafter the application for probation was granted (R. 966, 967).

The Government's position at the trial was that petitioner had no right to a transcript of this prior contradictory testimony of these witnesses, for the reason that it was given in an investigation by the Securities and Exchange Commission which was a confidential and secret proceeding, and that nothing therein occurring could be divulged. The further reason was advanced, that cross-examination concerning it was inadmissible in any event, because the witnesses admitted when testifying that they had given prior contradictory testimony which they branded as false, and that this admission alone precluded any further inquiry along this line.

On appeal the additional position was taken that petitioner's counsel had been permitted to cross-examine these witnesses at length with reference to the prior conflicting testimony.

In disposing of the contention made by petitioner that this was prejudicial error, the Circuit Court of Appeals held that the trial court was in error in refusing to order production of the prior sworn testimony of these witnesses, but that it was harmless error (R. 1262-1266). The opinion states (R. 1266):

> "* * * we do not declare approval of the course which was taken by the trial Court. We think the proper course in the situation which was presented to it by the defendant's demands is indicated by the Supreme Court in United States v. Socony Vacuum Oil

Co., supra. Whenever it is timely presented to the Court by a defendant in a criminal case that the transcripts of testimony of Government witnesses against him given before investigators contain evidence material to his defense at the trial, and demand is made therefor, the Court should issue process for the production thereof and should examine the same and should make its rulings as to admissibility or use in the trial of any part of the whole matter in the light of the transcripts before the Court. In making such rulings the Court is bound to exercise sound judicial discretion to accord the defendant the fair trial to which he is entitled and at the same time to confine the procedure to consideration of competent, relevant and material evidence. In failing to adhere to that course in this case, and in refusing absolutely to take any steps to compel production of the demanded transcripts, the trial Court was in error;"

The holding of the Circuit Court of Appeals that the error was harmless is, in effect, that the error would not be deemed prejudicial because the accused made no affirmative showing that his rights were prejudiced and placed on him the burden of showing that these transcripts, the right to examine which had been denied him, contained material matter of defense. The opinion states (R. 1263):

"The contention that appellant would have thrown some light on the issues more favorable to himself if he had had the transcripts is entirely speculative. The evidence affords no ground for any such belief and there is no statement throughout the briefs to justify an inference that such belief really exists."

And further (R. 1266):

"But in this case, where it is apparent that no essential ingredient of the offense was in any way dependent upon any matter contained in the transcripts and there is no reason to believe that any matter contained therein was competent, relevant or material

> matter of defense 'to order a new trial would be to violate the standards of Sec. 269 of the Judicial Code (U. S. C., Sec. 391), since the substantial rights of the defendant were not affected.' "

The opinion also found, contrary to the record, that petitioner was accorded the right of full cross-examination of these witnesses as to their prior contradictory testimony (R. 1262, 1265).

At the trial approximately twenty prominent citizens of the community testified that petitioner bore the highest reputation for veracity and honor (R. 1040, 1054, 1055, 1057-1061, 1066). Petitioner requested the Court to charge the jury:

> "The jury are instructed that the circumstances of a case may be such that an established reputation for good character, standing alone, may create a reasonable doubt, although without it the other evidence may be convincing,"

which was refused (R. 1092). Petitioner then requested the following instruction:

> "You are instructed that evidence of defendant's good character is in the same category as other factual evidence and must be considered by you in your deliberations and may of itself, if believed by you, create a reasonable doubt where otherwise no reasonable doubt would exist."

This request was refused (R. 1093).

On this issue the Court charged the jury (R. 1103) to the effect that if the jury found that defendant bore a good reputation, then such fact was to be considered with the other facts and circumstances of the case. That if it should, when considered with all the other evidence, raise a reasonable doubt as to the defendant's guilt, then he should be acquitted, and concluded with this statement:

> "But if all the evidence in the case, including that

which has been given on the matter of prior good reputation, convinces you of his guilt beyond a reasonable doubt, then his previous good reputation cannot excuse, mitigate or palliate such guilt to any extent whatever."

In overruling petitioner's contention that the refusal of his requested charge was error the Circuit Court of Appeals held in its opinion (R. 1274) that the evidence of guilt was convincing and no one could believe that proof of reputation, standing alone, was sufficient to raise a doubt of guilt, and that therefore the law put no obligation on the Court to tell the jury that it might do so, that the instruction quoted was good and there was no error in refusing petitioner's requested charge.

With reference to proof required for conviction in a perjury case, the Court charged the jury (R. 1099, 1104) to the effect that every material allegation in the indictment might be shown by a single witness except that the evidence was false and the accused did not believe it to be true, which must be shown by two witnesses or by one witness with circumstances of satisfactory corroboration. Petitioner requested the Court to charge the jury (R. 1093) that to convict of perjury it must be found that either two living witnesses testified of their own knowledge to the perjury or a living witness, plus corroborative evidence, that "circumstantial evidence of itself or corroborative evidence of itself is not sufficient to support a charge of perjury." This request was refused.

The Court further charged in direct conflict with the above-quoted portions of the given charge as follows (R. 1102):

> "I need scarcely tell you that proof of a crime may be either by direct or circumstantial evidence. Either is sufficient."

There then follows an explanation of what constitutes di-

rect evidence and what constitutes circumstantial evidence, and this portion of the charge then concludes (R. 1103):

> "These circumstances, I charge you, ought to be consistent with each other and consistent with the guilt of the defendant, and inconsistent with any reasonable hypothesis of the defendant's innocence."

With reference to the contention that there was an irreconcilable conflict in the charge on the kind of proof required, the Circuit Court of Appeals held (R. 1270) that the requirement of the law to sustain conviction for perjury was properly stated and then continues:

> "It appears that in the part of the Court's general instructions relating to the kind of proof by which commission of a crime may be made, the Court declared the general rule that it may be by direct or circumstantial evidence, either of which is sufficient, and the two kinds of evidence were described. That the general law was correctly stated is not questioned and it is clear from the instructions given that the jury was fully informed of the special exception applicable to the perjury charge. We find no error in giving or refusing instructions concerning the quantum of evidence upon the perjury charge."

The case was submitted to the jury and they retired at 12:45 p. m. July 25th, 1940, and at 2:37 p. m. July 26th, 1940, after being out for approximately twenty-six hours, the jury was ordered by the Court into the court room, whereupon the Court inquired if they had as yet arrived at a verdict and upon being informed that no verdict had been reached, the Court proceeded to give a supplemental charge (R. 1109). This charge is quite lengthy and for that reason is not here set out. It appears in the record at pages 1109 to 1111. In general it stressed the fact that the trial had been long and expensive and that a failure to reach a verdict would necessitate another equally ex-

pensive trial. It repeatedly emphasized the fact that a verdict should be returned. It contained repeated admonitions with reference to the duty of jurors to accord deference to each other's opinions and charged them that they should come to some agreement, at least upon some of the counts, and concluded that by adopting the method outlined in the Court's supplemental charge they would inevitably come to an agreement and a just verdict, but that on the other hand, "a dogged persistence not to listen to a fair discussion of the evidence or listen to fair argument, or listen to persuasive evidence or reason, is destructive of justice and has no place in the jury box."

Immediately upon the conclusion of this charge petitioner's counsel (R. 1111) excepted thereto on the ground that the case having been under submission for twenty-six hours, it was apparent that some of the jurors had a reasonable doubt and that the defendant was entitled to have that reasonable doubt determined in his favor, rather than to have the Court bring pressure upon the jury by giving a coercive charge admonishing them to reach a compromise between the counts of the indictment. Counsel then further moved the Court to discharge the jury and declare a mistrial, all of which were overruled (R. 1113). The jury retired at 2:52 p. m. immediately following the giving of this supplemental charge (R. 1113), and at 3:29 p. m., after an interval of only thirty-seven minutes, returned a verdict of guilty on counts 4 and 5 of the indictment and of acquittal on counts 1, 2 and 3 (R. 1114).

The Circuit Court of Appeals in its opinion overruled petitioner's contention that this charge was coercive and therefore constituted error (R. 1275), apparently disposing of the fact that the jury considered the case for twenty-six hours by stating that the issues were simple and the evidence of guilt such that there was little room for

reasonable doubt, but that petitioner was a man of impressive personality and the ability and energy of his counsel tended to obscure the obvious. The opinion states (R. 1276):

> "It was plainly the duty of the trial judge to seriously and earnestly impress upon the jury that they also had a sworn duty transcending personal inclination, to make true deliverance between the government and the accused. As the judge said nothing to tilt the scale in the jury's hands, either for or against the appellant, it cannot be said that he improperly coerced the verdict."

B.

QUESTIONS PRESENTED.

1. Did petitioner in this case, as disclosed by the record, have a fair trial?

2. Where a court has held in a criminal case that an accused under his right to a fair trial is entitled to have produced transcripts of prior contradictory testimony given by material Government witnesses against him, can the denial of this constitutional right be harmless error?

3. Under Section 269 of the Judicial Code (28 U. S. C. A. 391) is the burden on defendant in a criminal case to show affirmatively that he was not prejudiced by error which affects his substantial rights?

4. In a criminal case, is the burden on defendant cross-examiner to affirmatively show that transcripts of prior contradictory testimony given by witnesses for the Government, which he has been denied the right to see, contained relevant and material matter for cross-examination?

5. In a criminal case, does limitation of cross-examination by defendant of the principal Government witnesses

concerning their prior contradictory sworn testimony constitute prejudicial error?

6. In a criminal case, where evidence of good character on the part of defendant has been produced, is he entitled to an instruction that such evidence alone is sufficient to raise a reasonable doubt?

7. In a perjury case, can error in refusing to instruct the jury that circumstantial evidence alone is not sufficient to support a conviction, and in charging the jury that circumstantial evidence alone is sufficient, be cured by another portion of the charge stating the correct rule?

8. In a criminal case, after the jury has considered the issues for twenty-six hours without agreement and then, after receiving an additional charge, it returns a verdict in thirty-seven minutes acquitting on three counts of the indictment and convicting on two, can it be said that this supplemental charge was not coercive, where the charge stresses the length and expense of the trial and that failure to agree would necessitate another expensive trial; repeatedly emphasizes that a verdict should be returned, and contains repeated admonitions that the jurors accord deference to each other's opinions, and that a dogged persistence not so to do is destructive of justice, and that they should come to an agreement at least upon some of the counts, and states that if they follow the suggestions made in said charge they would inevitably agree?

C.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. (a) The opinion of the Circuit Court of Appeals holds that petitioner under his right to a fair trial was entitled to have the transcript of the prior contradictory testimony

of the principal witnesses against him produced, examined by the trial judge, and a determination made as to what portions thereof might be used for impeachment; that the refusal of the trial court so to do was error, but that such error was harmless. This decision is in effect that the denial of the constitutional right to a fair and impartial trial is harmless error, and it is deemed harmless because the accused did not make an affirmative showing that he was prejudiced thereby, and that therefore under Section 269 of the Judicial Code the judgment must be affirmed. In these respects and in the interpretation placed upon Section 269 of the Judicial Code the opinion is in conflict with the decisions of this Court in the following cases:

McCandless v. United States, 298 U. S. 342, 347;
Williams v. Great Southern Lumber Co., 277 U. S. 19, 26;
United States v. River Rouge Co., 269 U. S. 411, 421.

It is also in conflict with the following decisions of other circuits:

United States v. Dressler, 112 Fed. (2d) 972, 978 (7th Cir.);
Little v. United States, 73 Fed. (2d) 861, 866 (10th Cir.);
Lynch v. Oregon Lumber Co., 108 Fed. (2d) 283, 285 (9th Cir.).

(b) The opinion of the Circuit Court of Appeals holds that the trial court did not commit error by denying petitioner the right of cross-examination of these witnesses concerning their prior contradictory testimony (R. 1262). This holding is in conflict with the following decisions of this Court:

Alford v. United States, 282 U. S. 687, 691;
District of Columbia v. Clawans, 300 U. S. 617, 632.

(c) The opinion of the Circuit Court of Appeals places the burden upon the accused to affirmatively show that these transcripts contained relevant and material testimony which would have been of assistance to him for the purpose of impeaching these witnesses (R. 1263, 1266). This ruling is in conflict with the decision of this Court in

Alford v. United States, 282 U. S. 687, 691.

2. The opinion of the Circuit Court of Appeals in holding that it was not error to refuse petitioner's requested charge to the effect that an established reputation for good character alone may create a reasonable doubt, although without it the other evidence might be convincing, is in conflict with the decision of this Court in

Edington v. United States, 164 U. S. 361, 366,

and is also in conflict with the Court of Appeals for the District of Columbia and the Circuit Court of Appeals for the Seventh Circuit in the following cases:

Egan v. United States, 287 Fed. 958, 968 (C. A. D. C.);

Jones v. United States, 289 Fed. 536, 538 (C. A. D. C.);

Snitkin v. United States, 265 Fed. 489, 491 (C. C. A. 7th).

3. The trial court's charge to the jury in this, a perjury case, that circumstantial evidence alone was sufficient proof of a crime, was an erroneous statement of the law and it was error to refuse the requested charge that circumstantial or corroborative evidence of itself is not sufficient to support a charge of perjury. See:

Clayton v. United States, 284 Fed. 537, 539 (C. C. A. 4th);

United States v. Otto, 54 Fed. (2d) 277, 279 (C. C. A. 2nd);

Phair v. United States, 60 Fed. (2d) 953, 954 (C. C. A. 3rd).

The opinion of the Circuit Court of Appeals admits this, but holds that in other portions of the charge the jury was fully informed of the special exception applicable to a perjury case and that therefore no error was committed. In so holding the opinion is in conflict with the decision of this Court in

Mills v. United States, 164 U. S. 644, 646,

and with the following decisions of other Circuit Courts of Appeal:

De Groot v. United States, 78 Fed. (2d) 244, 248 (C. C. A. 9th);
Nicola v. United States, 72 Fed. (2d) 780, 787 (C. C. A. 3rd).

4. The opinion of the Circuit Court of Appeals in holding that the supplemental charge given to the jury after the case had been under submission for twenty-six hours was not coercive, and therefore did not constitute error, has so far departed from the accepted and usual course of judicial proceedings and sanctioned such departure by the lower court as to call for an exercise of this Court's power of supervision.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Judicial Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, and for a complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 11,799, Criminal, Frank J. Boehm, appellant, versus United States of America, appellee, and that the said

judgment of the said Circuit Court of Appeals for the Eighth Judicial Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FRANK J. BOEHM,

By JOHN S. LEAHY,
Counsel for Petitioner.